No. 322

In the Supreme Court of the United States

OCTOBER TERM, 1941

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Argument:	
Appellant was not entitled to a common carrier certificate or a contract carrier permit because he was not a common or contract carrier throughout the period prescribed by the Act	7
Conclusion	11

CITATIONS

Cases:	
Florida v. *United States*, 282 U. S. 194	10
Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282	10
Rochester Tel. Corp. v. *United States*, 307 U. S. 125	10
Superior Forwarding Co., Inc., 28 M. C. C. 755	11
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	10
United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454	10
United States v. *Maher*, 307 U. S. 148	9
United States v. *J. B. Margolies*, No. 53, this Term	4, 7
United States v. *N. E. Rosenblum Trucks Lines, Inc.*, No. 52, this Term	4, 7
Statutes:	
Motor Carrier Act, 1935 c. 498, 49 Stat. 543:	
Sec. 206 (a) as amended	2
Sec. 209 (a)	4

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OPINIONS BELOW

The opinion of the specially constituted district court (R. 36–40) is reported in 39 F. Supp. 780. The report of the Interstate Commerce Commission (R. 14–18, 22) is published in 24 M. C. C. 141 (the portion of the printed report referring to the Lubetich application beginning on page 147).

JURISDICTION

The final decree of the district court in this case was entered July 8, 1941 (R. 43). The petition for appeal was filed on July 9, 1941, and was allowed the same day (R. 44–46). Jurisdiction of this Court is based on the Urgent Deficiencies Act of October 22, 1913 (39 Stat. 208, 28 U. S. C. Secs. 47 and 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 28 U. S. C., Sec. 345); and the Motor Carrier Act, 1935, Section 205 (h)[1] (49 Stat. 543, 49 U. S. C., Sec. 305 (h)).

QUESTION PRESENTED

Whether the truck operations in which appellant was engaged on June 1, 1935, and thereafter, were those of a "common carrier by motor vehicle" or a "contract carrier by motor vehicle" as defined by the Motor Carrier Act of 1935 so as to entitle him to a certificate or permit from the Interstate Commerce Commission to operate as a common or contract carrier under the "grandfather" provisos of Sections 206 (a) and 209 (a) of the Act.

STATUTES INVOLVED

Section 206 (a) of the Motor Carrier Act of 1935 (c. 498, 49 Stat. 543), as amended by the Act

[1] This statute was applicable on July 2, 1940, the date of the Commission's order. The Transportation Act of 1940 (c. 722, 54 Stat. 898), approved September 18, 1940, rearranged this provision, without change, as Interstate Commerce Act, Part II, Section 205 (g).

of June 29, 1938 (c. 811, 52 Stat. 1236, 1238), and as amended by the Transportation Act of 1940 (c. 722, 54 Stat. 898, 923), provides in part as follows:

> *Necessity for; motor carriers in bona fide operation on June 1, 1935.*—Except as otherwise provided in this section and in section 210 (a) no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further pro-

> ceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: * * *.

Section 209 (a), applicable to contract carriers, is identical. It and other pertinent provisions of the Motor Carrier Act of 1935, applicable at the date of the Commission's order, July 2, 1940, are set forth in the Appendix to our brief in *United States* v. *N. E. Rosenblum Truck Lines, Inc.* and *United States* v. *J. B. Magolies,* Nos. 52 and 53, this Term, at pages 29–32. Amendments by the Transportation Act of 1940, approved September 18, 1940, are indicated.

STATEMENT

This is an appeal from the final decree of a specially constituted district court, convened pursuant to the Urgent Deficiencies Act of 1913,

dismissing appellant's petition to set aside an order of the Interstate Commerce Commission. The order denied appellant's application under the "grandfather" clauses of Sections 206 (a) and 209 (a) of the Motor Carrier Act of 1935 for operating authority as a "common" or "contract" carrier by motor vehicle (R. 24).

The Commission's findings show that appellant's method of operation was substantially the same as that of the appellees in Nos. 52 and 53.[2] Between June 1935 and January 1938 appellant operated two trucks under permits from the States of California, Washington, and Oregon. Most if not all of the traffic handled by appellant[3] was solicited and billed by other motor carriers and was transported in appellant's vehicles only between their terminals (R. 15). During the period from April 1937 until January 1938 the only freight transported in appellant's equipment was for Hendricks, a "common" carrier by motor vehicle (R. 17). In such instances the bills of lading were issued by Hendricks, which employed

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[2] Appellant does not attack the sufficiency of the evidence to support the Commission's findings and that evidence is not included in the record before this Court.

[3] In this case it was the appellant's predecessor in interest who was operating on June 1, 1935. Appellant's predecessors were John and his father Pete Lubetich, who conducted operations on a family basis, allegedly as co-partners (R. 15). For the purpose of this appeal, this change in interest is unimportant, and for convenience these predecessor operations will be referred to as appellant's operations.

appellant to transport the goods, paying him on southbound loads the total revenue less 10 percent, on northbound loads the total revenue, and on "express" traffic a flat rate of eighty cents per hundred pounds (R. 17). Hendricks' tariff rates were applied (R. 17). Appellant requested loading instructions from Hendricks and reported loadings to it (R. 17). Generally Hendricks paid shippers' claims, although the amount was later charged to appellant (R. 17). In January 1938 appellant completely changed his method of operation. He engaged a tariff solicitor, established terminals, and apparently discontinued acting as owner-operator for common carriers (R. 15).

From these subsidiary findings, the Commission concluded that the service performed "was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers" (R. 18). The Commission ruled that such operations did not entitle appellant to the operating authority sought by him and denied the application (R. 18, 24).

On January 8, 1941, appellant commenced this suit seeking to have the Commissioner's order set aside (R. 1). On June 10, 1941, the court filed its opinion (R. 36) and on July 8, 1941, entered findings of fact, conclusions of law, and a decree dismissing appellant's complaint (R. 43).

ARGUMENT

APPELLANT WAS NOT ENTITLED TO A COMMON CARRIER CERTIFICATE OR A CONTRACT CARRIER PERMIT BECAUSE HE WAS NOT A COMMON OR CONTRACT CARRIER THROUGHOUT THE PERIOD PRESCRIBED BY THE ACT

1. The instant case presents a question identical to the question in *United States* v. *N. E. Rosenblum Trucks Lines, Inc.*, No. 52, this term, and *United States* v. *J. B. Margolies*, No. 53, this term: Whether an owner-operator performing no service except to transport, under control of a common carrier, traffic solicited by the common carrier was a common or contract carrier within the meaning of Sections 206 (a) and 209 (a) of the Act. Here appellant claims a "common carrier" certificate or, in the alternative, a "contract carrier" permit, whereas in Nos. 52 and 53 the applications were for "contract carrier" permits. The difference between the cases is of no legal significance for, as pointed out in our brief in Nos. 52 and 53, the pivotal question which the Commission has to determine in each case under Sections 206 (a) and 209 (a) is whether the applicant was operating as a carrier, "contract" or "common," within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing.

In our brief in the *Rosenblum* case we have urged that where several applicants claim "grandfather" rights on the basis of exactly the same transportation service, only one operating au-

thority may be issued under the "grandfather" sections and it must be issued to the applicant who actually rendered the transportation service to the public and was therefore the carrier within the meaning of the Act (Br. pp. 14–18). We have also discussed the propriety of the test applied by the Commission for determining which one of several applicants is in fact the carrier, *i. e.*, which applicant actually had control over the operations in question (Br. pp. 23–25). The arguments there advanced are directly applicable to this case and need not be repeated.

2. The evidentiary findings of the Commission support its conclusion that appellant was not entitled to a certificate or permit under the grandfather sections thus interpreted. Appellant was one of three applicants seeking "grandfather" rights on the same transportation service. Separate hearings were had on each application, but all were decided in a single report (R. 8–22). One of the other applicants, Hendricks Refrigerated Truck Lines, Inc., opposed appellant's application, contending that prior to January 1938 appellant had merely been an owner-driver for it and that it was the carrier entitled to a certificate. Sustaining that contention the Commission made the findings summarized above. Particularly significant were these facts: During the period from April 1937 until January 1938 every shipment carried by appellant was carried for Hendricks (R. 17). Hendricks issued the bills

of lading (R. 17), paid appellant on the basis of total revenue minus 10 percent on southbound loads and the total revenue on northbound, and applied its own tariff rates (R. 17). At the request of appellant Hendricks gave loading instructions (R. 17) and, in the first instance, paid shippers' claims. After January 1938 appellant changed his method of operation, employed a freight solicitor, established terminals, and discontinued hauling for carriers (R. 15).

The ultimate finding of the Commission was that appellant had not established that he had been a common carrier or contract carrier by motor vehicle continuously after June 1 or July 1, 1935 (R. 22). There can be no question as to soundness of that conclusion. Not only was there no showing that appellant operated in any manner other than as an owner-operator employed and controlled by another carrier on the effective "grandfather" date, but also the recited evidentiary findings show affirmatively that from April 1937 to January 1938 appellant operated solely as an owner-operator in the employ and under the direction and control of Hendricks, which was a common carrier (R. 17) and which alone would be entitled to the certificate. If, therefore, appellant had ever engaged in any operation which would support his application, his work for Hendricks amounted to an abandonment which would defeat any claim to "grandfather" rights. *United States* v. *Maher*, 307 U. S. 148. Since the eviden-

tiary findings furnish a rational basis for the Commission's ultimate finding, the order must be sustained. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303. Appellant is not attacking the evidentiary findings and could not now do so for the evidence upon which they were made is not included in the record. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, and cases cited.

3. Appellant attacks the Commission's report on the ground that the Commission failed to find whether Hendricks was operating as a broker during the period in question and whether appellant's name was carried on the equipment. Appellant contends that the findings upon those points were "quasi jurisdictional" and that without them the order is void (Br. pp. 22–23).

The objection is unsound. Neither finding was essential to the existence of authority to enter the order and hence was not "quasi jurisdictional." See *United States* v. *Baltimore & Ohio Railroad Co.,* 293 U. S. 454, 462–463; *Florida* v. *United States,* 282 U. S. 194, 214–215. Moreover, since the Commission was satisfied by the evidence set forth in the findings summarized above that Hendricks and not appellant was the carrier in respect to the operations in which appellant was engaged, it became immaterial whether Hendricks acted as a broker in connection with some other operations.

Likewise the question whether appellant's name was carried on the equipment involved only one of the many factors which throw light on the ultimate issue which the Commission had to decide. *Superior Forwarding Co., Inc.*, 28 M. C. C. 755, 762. Where the ultimate finding of the Commission is supported by substantial evidence, its order may not be set aside for failure to exhaust inconclusive details.

CONCLUSION

It is respectfully submitted that the decree of the lower court should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 322.—October Term, 1941.

Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Appellant, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Western District of Washington.

[January 19, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a companion case to No. 52, *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, and No. 53, *United States* v. *Margolies*, this day decided. It is a direct appeal from the final decree of a specially constituted three-judge district court[1] dismissing appellant's petition to set aside an order of the Interstate Commerce Commission denying appellant's application under the "grandfather" clauses of Sections 206(a) and 209(a) of the Motor Carrier Act of 1935[2] for operating authority as a "common" or "contract" carrier by motor vehicle.

The Commission's findings[3] show that appellant's method of operations was substantially the same as that of appellees in the *Rosenblum* and the *Margolies* cases. Appellant operated between Los Angeles and Seattle and held permits from the States of California, Oregon, and Washington. Between June 1935 and January 1938 most, if not all, of the traffic handled by appellant was solicited and billed by other motor carriers and moved in appellant's vehicles only between the terminals of those other carriers.

[1] Convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 220, 28 U. S. C. secs. 47 and 47(a)) and Section 205(h) of the Motor Carrier Act of 1935, rearranged by the Transportation Act of 1940, 54 Stat. 899, as Section 205(g) of Part II of the Interstate Commerce Act.

[2] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

[3] Since the evidence upon which these findings were made is not included in the record before us, appellant may not here attack them. Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 286, and cases cited.

From April 1937 until January 1938 appellant hauled exclusively for a single common carrier, Hendricks Refrigerated Truck Lines, Inc. The goods moved on Hendricks' bills of lading and its tariff rates were applied. Appellant requested loading instructions from, and reported loadings to, Hendricks. Appellant received the total revenue less ten percent on southbound loads and the total revenue on northbound loads. On "express" traffic he received a flat rate of eighty cents per hundred pounds. Shippers' claims generally were paid in the first instance by Hendricks and then charged back to appellant.

In January 1938 appellant engaged a solicitor of his own, established terminals and apparently discontinued the operations previously conducted in connection with other carriers.

On the basis of its findings the Commission concluded that the service performed "was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers."[4]

While the application in the instant case is for a common carrier certificate, or, in the alternative, for a contract carrier permit, rather than for a contract carrier permit as in No. 52, *United States* v. *N. E. Rosenblum Truck Lines, Inc.* and No. 53, *United States* v. *Margolies*, that difference is without legal significance. The question in both situations is whether the applicant was a carrier, either common or contract, within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing. For the reasons set forth in the *Rosenblum* and *Margolies* cases, this day decided, the decision below must be affirmed.

We have considered and found without substance appellant's argument that findings as to whether Hendricks was acting as a broker during the period in question and as to whether appellant's name was carried on his equipment were "quasi jurisdictional" and that the absence of findings on those points renders the order void. Neither finding was here essential to the existence of authority to enter the order and hence was not "quasi jurisdictional". Cf. *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 462-463; *Florida* v. *United States*, 282 U. S. 194, 214-215. One of the findings of the Commission, which appellant may not attack[5] was that appellant hauled "for Hendricks, a common

[4] 24 M. C. C. 141 at 147.

[5] See Note 3, *ante*.

carrier by motor vehicle", and the Commission was satisfied from the evidence before it that Hendricks, and not the appellant, was the carrier in respect to the operations in which appellant was engaged. It was therefore immaterial whether Hendricks acted as a broker in connection with some other operations. Whether appellant's name was on his equipment can only be a factor bearing on the ultimate issue. It is in no sense "quasi jurisdictional."

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.